Supreme Court, U.S.
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NO. 90-1082

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HETTIE M. MINNICKS,
as Executrix of the Succession
of Stephen A. Mistich
Petitioner,

versus

BRANDON L. MISTICH,
REBECCA MISTICH TERRASE,
and PATRICIA MONROE MISTICH, as natural tutrix
of SHAWN A. MISTICH
Respondents.

ON PETITION FOR WRIT
OF CERTIORARI TO THE LOUISIANA COURT OF
APPEAL, FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

Frank H. Walk, Jr.
Counsel of Record
Frederick W. Swaim, Jr.
600 Carondelet St., Suite 602
New Orleans, Louisiana 70130-3587
(504) 522-6090
Counsel for Petitioner

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

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SUMMARY OF THE CASE

Petitioner on December 13, 1991 filed her petition to this Court for a writ of certiorari to the Louisiana Court of Appeal, Fourth Circuit. This state court had refused to substitute Petitioner, as the executrix of the estate of a deceased seaman, in a Jones Act and general maritime law *personal injury* case on appeal, in which the seaman *before his death* had been awarded a final trial court judgment. Instead the state court, utilizing state law, had substituted the tort *survival* action beneficiaries, although no survival action was involved. The motions and briefs of all parties had treated this substitution issue as determining not merely 1) the party having *procedural* capacity, but also 2) the party to be the *substantive* beneficiary of the judgment.

Yet there was no opinion accompanying the Court of Appeal's decision which had only stated that the motion "is denied" and cited *Nathan v. Touro Infirmary*, So.2d (La. 1987), a state law tort *survival* action case. See Petition for Writ of Certiorari (hereafter "Petition"), Appendix, page A-6. The court did not expressly hold that the parties ordered substituted had merely procedural capacity nor that the seaman's estate would be the ultimate substantive beneficiary of the judgment. The full extent of the court's holding was unclear.

Petitioner on November 14, 1990 filed in the Court of Appeal a petition of intervention. This was done out of an abundance of caution, and in order to obtain clarification from the Court of Appeal as to whether its decision denying Petitioner's substitution determined not only 1) The proper *procedural* party, but also 2) the *substantive* beneficiary of the judgment. Petitioner's intervention asserted the applicability of Federal maritime law to the seaman and his estate's substantive maritime rights, which would at least give Petitioner the right to intervene in the appeal as the substantive beneficiary in interest of the seaman's judgment rights. This intervention was premised on the position that the Court of Appeal decision at most could have

determined only the party having procedural capacity to appear in the case.

The Court of Appeal's December 28, 1990 denial of Petitioner's intervention thus clarified that its prior denial of Petitioner's motion to substitute did determine *both* the procedural party and the substantive beneficiary. The court's decision stated that under cited Louisiana law "the proper party to be substituted as the legal successor are the children of the deceased plaintiff." (See Appendix, page A-1).

ARGUMENT

Respondents' Opposition for the first time raises arguments which must now be addressed.

In Respondent's Brief in Opposition to the Petition (hereafter "Opposition"), Respondent states on page vi in the Statement of Jurisdiction that the Louisiana Court of Appeal's denial of Petitioner's motion to substitute "involved merely the procedural substitution of parties." The purpose of such a statement is to mischaracterize the question involved as merely "procedural" so that Federal maritime law perhaps may not be applicable. But this mischaracterization, made throughout the Opposition, is not tenable.

The Louisiana Court of Appeal, in denying the executrix's intervention, expressly regarded the question involved as one, not of mere procedural capacity, but as dealing with the substantive question of the ultimate beneficiary in interest, the "legal successor." The state court relied on state law.

Now it is perfectly clear that the state court had used state law, contrary to settled Federal law, to deny Petitioner her substantive Federal maritime right.

Respondents mistakenly state (Opposition, page 2) that Petitioner "conceded" that Louisiana law "controlled the substitution of parties." Yet a reading of Petitioner's memorandum

to the Court of Appeal shows Petitioner argued that *both* Federal and state law provided that she as executrix of the estate was the proper party to be substituted. See Opposition, Appendix 3. Petitioner's subsequent writ application to the Louisiana Supreme Court also argued that *both* Federal and state law required her substitution. (See herein, Appendix, page A-2).

Respondents also mistakenly argue (Opposition, pages 3,4,5, and 11) that Petitioner's Memorandum in Support of Petition of Intervention conceded that the substitution issue was a procedural issue governed by state law. Yet a reading of even the short excerpt of the document which Respondents included as their Appendix 4 shows, to the contrary, that Petitioner intervened on the premise that Federal maritime law must apply to a seaman's substantive maritime rights, so the state court *at most* could have decided only the issue of *procedural* capacity. (See Respondents' Appendix 4, page A-9).

Respondents discuss (at Opposition, page 4) the relevancy of the deceased plaintiff's will. Petitioner is there quoted from her opposition to the defendant-appellant's motion, for a stay of the appeal, which had relied upon the will as a reason for granting a stay. The point being made by Petitioner was that the deceased's testacy or intestacy was not relevant to determining his estate as the proper party to be substituted. In either case the judgment rights belonged to the estate.

Respondents claim that Petitioner is asking this Court to "determine new issues not addressed by the courts below" and that "it is the denial of this procedural substitution alone that is before the Court." (Opposition, pages 5 and 11). Yet Petitioner's Petition for Certiorari at pages 9 and 10 expressly posited, and the state court has now confirmed, that its denial of Petitioner's motion to be substituted for the deceased seaman was indeed a denial of both Petitioner's procedural capacity and also a denial of the estate's substantive Federal maritime rights in the judgment.

The Respondents have mischaracterized this matter not only by considering this a question of mere "procedure," but also by variously considering this a question of "survival".

They rely on state and Federal survival statutes to justify substituting themselves as ultimate beneficiaries, but also imply that it is not a question of survival, but of mere procedure, to justify applying state law to this Federal maritime action under the saving to suitors clause.

This survival mischaracterization also appears throughout Respondents' Opposition. For instance, in saying that "[t]here is no material difference between Louisiana law and *applicable federal law* when it comes down to a determination of what takes place when an injured person dies." (Opposition, page 9, emphasis added.) Referring to this Federal law, Respondents cite 45 U.S.C. Section 59, the *survival* provision of the Federal Employers Liability Act (FELA), and even quote its title: "*Survival* of right of action of person injured." (emphasis added.)

Respondents keep returning to "survival" because this is the only way they, the survival beneficiaries, would have rights here. But they would have rights only if this would be a survival case. This is definitely not a survival case.

Respondents cite, as the Federal equivalent to the state procedural law on which they rely, the FELA Section 59 "survival" provision. Again, they tell us that there is no "material difference between Louisiana law and applicable federal law." Thus, Respondents treat this as a survival question, which of course it is not since the deceased reduced his action to judgment before he died. In contrast, FELA Section 59 addresses the survival of a right of action, which would no longer survive after being merged into a judgment.

In denying that this is a survival case, and at the same time referring to FELA Section 59 as the Federal equivalent to the applied state law, Respondents are erroneously implying that Section 59 does not deal with the survival of actions.

Yet, since this is not a survival case, and since therefore

Section 59 of the FELA is not applicable, there can be no equivalence between state and Federal law demonstrated by reference to Section 59, the Federal survival provision. And if Respondents are treating this as a question of survival of actions in order to be substituted as ultimate beneficiaries, then Respondents are clearly wrong. Again, this is not a case of survival, in which an injured seaman would have died *before* merging his cause of action into a final judgment.

Contrary to what Respondents assert, *Connors v. Gallick,* 339 F.2d 381 (6th Cir. 1964), is applicable to the question herein. In *Connors* the question presented was whether a child of the deceased had a right to participate in a settlement by the deceased's widow as executrix of his estate. If there was a survival action under FELA Section 59, then a child of the deceased would have such a right as a survival beneficiary. But if the personal injury judgment, recovered by the deceased before his death, was simply an asset of his estate, then of course the executrix could freely settle without the daughter's participation. The *Connors* court stated the question was:

> [W]hether Gallick's death while the motion for a new trial was pending brought into existence a survival cause of action in which [the child] became such a beneficiary as to be entitled to participate in the settlement fund. (339 F.2d at 382)

The court held that Section 59 was inapplicable because there was no survival cause of action. The court further stated:

> Gallick's cause or causes of action having been merged in his judgment * * * Gallick's death did not convert his judgment into a cause of action to be prosecuted for the benefit of his widow and the plaintiff as his child. (339 F.2d at 386)

The court held the judgment settlement proceeds to be part of the deceased's estate.

Thus *Connors* is not an "aberration" from the FELA

Section 59 survivorship provision, as Respondents argue. Rather, *Connors* is not a survival case at all, and neither is the present case. Yet Respondents state:

> This case [*Connors*] does not in any way tarnish the clear intent of La. C.C.P. Article 801, La. C.C. Article 2315.1 *and 45 U.S.C. Section 59* or the established jurisprudence mandating that the rights *of survivors under federal*, or state law, do not form a part of decedent's estate. *Connors* is clearly an aberration under the well-established law *that the cause of action which survives under the FELA* provision does not *survive* for the benefit of the decedent's estate, but for the *listed* [in Section 59] beneficiaries in the order specified. *45 U.S.C. Section 59. Hogan v. New York Central R. Co.*, 223 F.890 (D.C. N. Y. 1915) (Opposition, pages 10-11, emphasis added).

Note *Hogan* is a survival action case in which the railroad worker died at work and no suit or judgment existed prior to his death. Respondents in this quote are clearly speaking about survival of actions. This illustrates Respondents' mischaracterization of this case as a survival case. Only by treating this as a survival case, of course, can Respondents argue that survival beneficiaries should be substituted as ultimate beneficiaries.

CONCLUSION

This question of post-judgment substitution of parties is neither a matter of mere procedure nor a matter of survival of a right of action. Thus a writ of certiorari should be issued, or summary reversal ordered, to remedy the state court's refusal to follow controlling Federal maritime law in this saving to suitors clause, Jones Act and general maritime law case.

Respectfully submitted,

FRANK H. WALK, JR.
FREDERICK W. SWAIM, JR.
Counsel for Petitioner
600 Carondelet St., Suite 602
New Orleans, Louisiana 70130-3587
(504) 522-6090

APPENDIX

STEPHEN A. MISTICH	*	NO. 89-CA-1420
VERSUS	*	COURT OF APPEAL
BROWN & ROOT, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * * * * * * * *

The Petition for Intervention filed by Hettie M. Minnick is denied. Under Louisiana Code of Civil Procedure Article 801 and Louisiana Civil Code Article 2315.1 the proper party to be substituted as the legal successor are the children of the deceased plaintiff.

New Orleans, Louisiana, this 28th day of December, 1990.

(SIGNED) RFB
Judge Rudolph F. Becker, III

(SIGNED) DAB
Judge Denis A. Barry

(SIGNED) JBA
Judge Bernard Armstrong

STATE OF LOUISIANA

SUPREME COURT

NO. 90-C-1241

STEPHEN A. MISTICH

VS.

BROWN & ROOT, INC.

From the Court of Appeal, Fourth Circuit No. 89-CA-1420

APPLICATION FOR SUPERVISORY WRIT, OR ALTERNATIVELY,

WRITS OF MANDAMUS, PROHIBITION AND REVIEW (SUPPLEMENTAL)

Hettie M. Minnicks, as executrix of the succession of the deceased original plaintiff, Stephen A. Mistich, hereby applies for a supervisory writ, or alternatively for writs of mandamus, prohibition, and review based on the following.

* * *

ASSIGNMENT OF ERRORS

The Court of Appeal erred in refusing to substitute as the sole proper party plaintiff-appellee the executrix of the succes-

sion of the original plaintiff, who had died after obtaining judgment on his Jones Act and general maritime law, personal injury claims.

ARGUMENT

a. Federal maritime claims in state court under Saving to Suitors clause as to substantial rights must be governed by Federal law.

The original plaintiff seaman brought his Federal Jones Act and general maritime claims in the Louisiana State Court under the Saving to Suitors clause, 28 U.S.C. 1333. In this situation, this Court in *Lavergne vs. Western Co. of North America, Inc.*, 371 So.2d 809 (La. 1979), concerning a seaman's right to a jury trial, has stated:

> The federal substantive admiralty or maritime law applies if the claim is one cognizable in admiralty. *Atlantic & Gulf Stevedores, Inc. vs. Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); *Pope & Talbot, Inc. vs. Hawn*, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); *Garrett vs. Moore-McCormack Company*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942).

There this Court at page 810 further stated:

> It has long been established that a state court, having concurrent jurisdiction with the federal courts as to *in personam* admiralty claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law. (citation omitted).

Most recently this Court, in *Neely vs. Hollywood Marine, Inc.*, 530 So.2d 1116 (La. 1988), held at page 1123, "Sub-

stantive maritime law controls in state court and the state cannot, by its procedural practice, substantially alter the rights of litigants under substantive maritime law." (citations omitted).

The Federal jurisprudence is the source for this law. See *Garrett vs. Moore-McCormack Company*, supra, a Jones Act and general maritime law case originally heard in state court under the Saving to Suitors clause where, in prohibiting application of Pennsylvania state law to determine validity of a release, the Court stated:

> If in its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.
> ***
> So here, in hearing this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected.

In *Chelentis vs. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 502, 62 L.Ed. 1171 (1918), it was held that the measure of personal injury damages recoverable by a seaman was determined by federal maritime, not New York state law whose application "would be destructive of the 'uniformity and consistency at which the Constitution aimed'" for interstate commerce.

Similarly, in *Pope*, supra, denying the application of Pennsylvania state contributory negligence in place of maritime comparative negligence, it was stated:

> While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court.

Offshore Logistics, Inc. vs. Tallentire, 447 U.S. 242, 106 S.Ct. 2485, 91 L.Ed.2d 202, discussing the Saving to Suitors clause stated that state and federal courts exercising jurisdiction under that clause "were obliged to apply governing federal substantive law in resolving those claims to the extent state common law remedies conflicted with governing federal maritime law."

In *J.B. Efferson Co. vs. Three Boys Corp.*, 238 F.2d 611, 615 (5th Cir. 1956), holding a state time limitations statute inapplicable, defined "maritime law", for purposes for the Saving to Suitors clause, as "Such law is that which the Congress has enacted or the Federal courts, sitting in admiralty or in the exercise of their maritime jurisdiction have declared and would apply."

b. Federal law creates and protects the substantive right of the executrix.

Had this case been heard in the Federal courts, Federal Rule Of Appellate Procedure 43, Substitution of Parties, subpart (a), "Death of a Party" would require the "personal representative of the deceased party", here the succession executrix, to be substituted as a party in place of the original plaintiff.

Substantive law according to *Black's Law Dictionary* (5th Ed.) is "That part of law which creates, defines, and regulates rights...that which creates duties, rights, and obligations." In the instant case the executrix's right of action is her primary and most substantive right, and so her right of action is created by federal substantive law. **This is true whether or not the rule of substitution of parties be described as a "proce-**

dural" rule. See the conflicts of law authorities cited in subsection c. below.

F.R.A.P. Rule 43 was in effect at the time of *Stein vs. Sea-Land Services, Inc.*, 440 F.2d 1181 (1971) where as here the seaman had received a trial court judgment in his lifetime for his personal injuries under the general maritime law of unseaworthiness. While the judgment was on appeal the seaman died, as here. Thereafter his widow and administratrix of his succession was substituted for the decedent as plaintiff-appellee and the case was affirmed in her favor. This case preceded the later case where the widow for herself asserted additional claims for wrongful death and survival causes of action in *Sea-Land Services, Inc. vs. Gaudet*, 514 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). There Justice Powell in his dissent at 94 S.Ct. 828, Note 23, referred to the prior case and noted without objection that "because Gaudet's death intervened between the jury verdict and the appeal, his recovery went directly to his estate, not to him personally."

As to the substitution of a party in the Jones Act portion of the claim, the fact situation here falls under the holding of *Connors vs. Gallick*, 339 F.2d 381 (6th Cir. 1964), a Federal Employers Liability Act (FELA) (45 U.S.C. 51) case which involved a railroad employee who died after receiving a trial court judgment, raising the question of whether the survivorship provision of the FELA (45 U.S.C. 59) applied to a settlement by the employee's estate to the exclusion of his daughter. This survivorship provision is incorporated by reference into the Jones Act. The court held that the survivorship provision did not apply where the employee died after rendition of the judgment and pending appeal. The judgment and the resulting settlement belonged to the employee's estate, the court stating:

> Gallick is his lifetime had prosecuted his own cause of action to judgment, and his death did not

abate his action or vacate his judgment.

***

Gallick died possessed not of an unlitigated cause of action, but of a judgment which became part of his estate.

Also see *Taylor vs. Taylor*, 232 U.S. 363, 34 S.Ct. 350, 58 L.Ed. (1914), a FELA wrongful death and survival actions case holding that the New York state succession law was pre-empted by the FELA grant of the right of action to specified parties. Similarly in our case Federal law clearly grants a substantive right of action to the executrix, and this right is supreme over any contrary law of the state of Louisiana, the forum court.

* * *

c. Conflicts of laws principles support the executrix's position.

Also note an underlying conflicts of law situation exists, and the authorities support the executrix's position. See *Restatement (Second) of Conflict of Laws*, Section 122, Comment a., discussing the application of forum local law rather than the law of the jurisdiction under which the right originated. One factor favoring the original jurisdiction's law would be if the application of the local law "would be likely to affect the ultimate result of the case." A second factor, the classification of the issue as "substantive, also favors applying the original jurisdiction's law (here federal). The other two factors discussed are not relevant here. Also see *Restatement* Section 125, Comment a., stating "the local law of the forum as such will not...be applied when its application would substantially affect the rights and duties of the parties. Also see Edward S. Stimson, *Conflict of Laws (1963)* stating at page 28 "the true objective of conflict of laws rules is that the outcome of the suit should be the same regardless of the jurisdiction in which it is brought." And on page 29 stating "if there is doubt as to whether the law applied will

affect the result, the law of the forum should not be applied."

Finally, see W. Cook, *"Substance" and "Procedure" and the Conflict of Laws*, 42 Yale L. J. 333 (1933) at page 344 characterizing the correct test as "How far can the court of the forum go in applying the rules taken from the foreign system of the law without unduly hindering or inconveniencing itself?" At page 349 Cook distinguishes between primary rights, secondary rights, (both considered substantive) and tertiary (or procedural) rights having to do with the mode of enforcing the prior existing rights. In the instant case the executrix's right of action, her right to be substituted as the sole party, is clearly substantive and may not be rightfully taken from her under some state forum procedure alleged to be applicable.

d. Alternatively, the executrix is the proper party to be substituted under state law.

Alternatively, assuming arguendo that Louisiana state law should apply to the substitution of parties, the same result would obtain in favor of the executrix.

This is not a survival action nor a wrongful death action. This is an action for personal injuries prosecuted through trial and to judgment by the original plaintiff himself. Also it should be kept in mind that plaintiff's actions were not under Louisiana Civil Code Article 2315 nor under any other articles of that chapter of the Civil Code entitled "Of Offenses and Quasi Offenses".

* * *

f. Conclusion

For these reasons this Court is urged to grant a supervisory writ, or alternatively, writs of prohibition, mandamus, and review

to remove the adopted children as parties plaintiff-appellee herein, and further to substitute as the sole proper party plaintiff-appellee Hettie M. Minnicks as the executrix of the succession of Stephen A. Mistich.

Respectfully submitted:

(Signed) Frank H. Walk, Jr.
Frank H. Walk, Jr.
600 Carondelet St., Suite 602
New Orleans, LA 70130
(504) 522-6090 LSBA #13165